Dato' Seri Anwar bin Ibrahim v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–19–01 OF 2012
AZIAH ALI, ROHANA YUSUF AND ZAWAWI SALLEH JJCA
21 FEBRUARY 2014

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Criminal Procedure — Appeal — Evidence — Fresh or additional evidence — Application to recall witness to adduce additional evidence — Whether additional evidence available at trial — Whether evidence relevant — Whether there was specific reference to finding of fact to be controverted by additional evidence — Whether application identified evidence to be obtained from recalled witness — Whether court should exercise discretion to receive additional evidence — Courts of Judicature Act 1964 s 61

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Dato' Seri Anwar bin Ibrahim ('the applicant') had been charged for committing carnal intercourse against the order of nature, an offence punishable under s 377B of the Penal Code. He was acquitted and discharged by the High Court. The public prosecutor appealed against the applicant's acquittal. While the appeal was still pending, the applicant filed the present application for leave to recall a witness (SP25) pursuant to s 61 of the Courts of Judicature Act 1964 ('the CJA'). The motion for leave to recall the witness, was solely predicated on the decision of the High Court judge Dato' Zaleha bt Yusof ('Zaleha Yusof's decision') rejecting the petition of SP25 to be admitted as an advocate and solicitor. The applicant argued that Zaleha Yusof's decision was significant and pertinent because it would reflect adversely and negatively on the credibility of SP25, who was an important witness in the applicant's trial. It was the applicant's contention that if Zaleha Yusof's decision had been available at his trial, the trial judge would have rejected SP25's evidence and in all likelihood ruled that the prosecution had failed to make out a prima facie case. The respondent opposed the application on the grounds that it failed to meet the cumulative requirements to be met for leave to be granted under s 61 of the CJA. Further, the respondent submitted that the application was not seeking to adduce additional evidence that was not available at the trial but sought to reopen issues already litigated at the trial.

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Held, dismissing the application:

(1) The four cumulative conditions enunciated in the case of *R v Parks* [1961] 3 All ER 633 as to when a Court of Appeal ought to exercise its discretion under s 61 of the CJA to receive additional evidence were not complied with in the present application. The SUHAKAM report, which was the determinative factor in Zaleha Yusof's decision, was already

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available at the time of the applicant's trial. That aside it was also referred to and marked in the course of the applicant's trial. In the circumstances the first of the four cumulative conditions was not met (see para 15).

(2) Zaleha Yusof's decision was inadmissible for the purpose of proving the truth in the hearing of the applicant's appeal. Hence it was irrelevant. Further, SP25's credibility had already been challenged during the applicant's criminal trial based on the SUHAKAM Report. Thus the evidence intended to be adduced through the recall of SP25 would be irrelevant. Since, the applicant had failed to satisfy two of the four cumulative conditions for this court to invoke s 61 of the CJA, there was no necessity to deal with the other requirements (see paras 16, 18 & 20).

(3) The application did not make specific reference to the finding of fact that was intended to be controverted by the evidence sought to be adduced by way of this application. The application also failed to clearly identify with precision the intended evidence which the applicant desired to be obtained in recalling SP25. The general discretion given to the court to admit evidence under s 61 of the CJA had to be exercised sparingly having regard to the important principle that there should be finality in judgment. Thus, in the instant case the motion to recall SP25 had to be refused (see paras 22, 24–25).

[Bahasa Malaysia summary

Dato' Seri Anwar bin Ibrahim ('pemohon') telah didakwa melakukan persetubuhan luar tabii, kesalahan yang boleh dihukum di bawah s 377B Kanun Keseksaan. Beliau dilepaskan dan dibebaskan oleh Mahkamah Tinggi. Pendakwa raya membuat rayuan terhadap pembebasan pemohon. Walaupun rayuan itu masih belum selesai, pemohon memfailkan permohonan ini untuk kebenaran untuk menarik balik saksi (SP25) menurut s 61 Akta Mahkamah Kehakiman 1964 ('AMK'). Usul untuk mendapatkan kebenaran untuk menarik balik saksi itu, semata-mata berdasarkan pada keputusan Hakim Mahkamah Tinggi Dato' Zaleha bt Yusof ('keputusan Zaleha Yusof') yang menolak petisyen SP25 untuk diterima masuk sebagai seorang peguambela dan peguamcara. Pemohon berhujah bahawa keputusan Zaleha Yusof adalah penting dan berkaitan kerana ia akan mencerminkan secara buruk dan negatif kepada kredibiliti SP25, yang merupakan saksi penting dalam perbicaraan pemohon. Adalah hujahan pemohon bahawa jika keputusan Zaleha Yusof telah disediakan dalam perbicaraannya, hakim akan menolak bukti SP25 dan dalam semua kemungkinan memutuskan bahawa pihak pendakwaan telah gagal membuktikan kes prima facie. Responden membantah permohonan itu atas alasan bahawa ia gagal memenuhi syarat-syarat kumulatif yang perlu dipenuhi untuk kebenaran yang akan diberikan di bawah s 61 AKM. Selanjutnya, responden berhujah bahawa permohonan bukannya untuk mengemukakan keterangan tambahan yang tiada sewaktu perbicaraan tetapi

meminta untuk membuka semula isu-isu yang telah dilitigasi pada perbicaraan.

Diputuskan, menolak permohonan itu:

(1) Empat syarat kumulatif yang dinyatakan dengan jelas dalam kes *R v Parks* [1961] 3 All ER 633 tentang bila Mahkamah Rayuan patut menggunakan budi bicaranya di bawah s 61 AMK untuk menerima keterangan tambahan telah tidak dipatuhi dalam permohonan ini. Laporan SUHAKAM, yang merupakan faktor penentu dalam keputusan Zaleha Yusof, sudah sedia ada pada masa perbicaraan pemohon. Selain itu ia juga dirujuk dan ditandakan dalam perbicaraan pemohon. Dalam keadaan itu syarat pertama daripada empat syarat kumulatif tidak dipenuhi (lihat perenggan 15).

(2) Keputusan Zaleha Yusof tidak boleh diterima bagi tujuan membuktikan kebenaran dalam mendengar rayuan pemohon. Oleh itu ia adalah tidak relevan. Selanjutnya, kredibiliti SP25 telah pun dicabar semasa perbicaraan jenayah pemohon berdasarkan laporan SUHAKAM. Oleh itu keterangan yang ingin dikemukakan melalui penarikan balik SP25 akan menjadi tidak relevan. Memandangkan, pemohon telah gagal untuk memenuhi dua daripada empat syarat kumulatif bagi mahkamah ini untuk menggunakan s 61 AMK, tidak ada keperluan untuk membicarakan syarat-syarat yang lain (lihat perenggan 16, 18 & 20).

(3) Permohonan itu tidak membuat rujukan khusus kepada dapatan fakta yang bertujuan untuk dipertikaikan dengan mencari keterangan yang hendak dikemukakan melalui permohonan tersebut. Permohonan itu juga gagal untuk mengenal pasti dengan jelas dengan ketepatan bukti yang dimaksudkan yang mana dikehendakki oleh pemohon untuk diperolehi dalam penarikan SP25. Budi bicara am yang diberikan kepada mahkamah untuk menerima keterangan di bawah s 61 AMK mesti dijalankan dengan berhati-hati dengan mengambil kira prinsip penting yang perlu ada dalam penghakiman muktamad. Oleh itu, dalam kes ini usul untuk menarik balik SP25 mesti ditolak (lihat perenggan 22, 24–25).]

Notes

For cases on evidence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 529–579.

Cases referred to

Ampthill Peerage Case [1976] 2 All ER 411, HL (refd)
Brown v The Queen (1993) 16 CRR (2nd) 290, SC (refd)
Che Din bin Ahmad v PP [1976] 1 MLJ 289; [1975] LNS 7 (refd)
D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12, HC (refd)

Leng Lian v SM Yusudian [1939] MLJ Rep 222 (refd)
Mulholland and another v Mitchell (by his next friend Hazel Doreen Mitchell) [1971] 1 All ER 307, HL (refd)
Murugayah v PP [2004] 2 MLJ 545; [2004] 1 LNS 109, CA (refd)
Phung Geok Hoay lwn Pendakwa Raya [2013] 3 MLJ 728, CA (refd)
R v Parks [1961] 3 All ER 633, CA (folld)
R v Pendleton [2002] 1 WLR 72, HL (refd)
Uddin (a child) (serious injury: standard of proof), Re [2005] 3 All ER 550, CA (refd)
Taylor and another v Lawrence and another [2002] 2 All ER 353, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 61, 61(1)
Evidence Act 1950 s 43
Penal Code s 377B

Appeal from: Criminal Trial No 45–9 of 2009 (High Court, Kuala Lumpur)

Karpal Singh (Ram Karpal Singh, Sangeet Kaur Deo and Zaleha Al-Hayat with him) (Karpal Singh & Co) for the applicant.
Muhammad Shafee bin Md Abdullah (Mohamad Hanafiah bin Zakaria and Noorin bt Badaruddin with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] Dato' Seri Anwar bin Ibrahim ('applicant') by notice of motion dated 4 February 2014 in encl 62a supported by his affidavit affirmed on the same date in encl 62b is seeking for the following orders:

(1) The applicant be granted leave pursuant to section 61 of the Courts of Judicature Act, 1964 to recall SP25, Judy Blacious s/o A F Pereira, Investigating Officer in High Court, Kuala Lumpur (Perbicaraan Jenayah No: 45-9-2009 Pendakwa Raya Iwn Dato' Seri Anwar Ibrahim) in relation to the rejection of the Petition for admission to the Bar of the High Court in Malaya (Petition No 18-730-07/2012) on the application of SP25 by the High Court, Kuala Lumpur by YA Dato' Zaleha binti Yusof on 10th January 2014 on the ground that SP25 is not a fit and proper person to be admitted to the Bar of the High Court in SUHAKAM (REPORT OF SUHAKAM PUBLIC INQUIRY INTO THE ARREST AND DETENTION OF FIVE LAWYERS OF THE KUALA LUMPUR LEGAL AID CENTER ON 7 MAY, 2009.

(2) Any further or other order deemed fit and proper by this Honourable Court.

[2] A brief advertence to the factual antecedents of the case is necessary to put the notice of motion in its proper perspective. A

[3] The applicant was charged in Kuala Lumpur High Court Criminal Trial No 45–9 of 2009 for committing carnal intercourse against the order of nature to one Mohd Saiful Bukhari bin Azlan, an offence punishable under s 377B of the Penal Code ('the second sodomy trial'). At the end of the trial, the applicant was acquitted and discharged. Dissatisfied by the said order of acquittal and discharge, the public prosecutor lodged an appeal to the Court of Appeal. The appeal is still pending before the Court of Appeal. B C

[4] The motion for leave to recall SP25 (En Judy Blacious s/o AF Pereira) is solely predicated on the decision of the High Court Judge YA Dato' Zaleha bt Yusof ('Zaleha Yusof's decision') in rejecting the petition of SP25 to be admitted as an advocate and solicitors on 10 January 2014. SP25 was found not a fit and proper person by reason of the finding made by SUHAKAM against him in the Report of Suhakam Public Inquiry Into The Arrest And Detention of Five Lawyers of The Kuala Lumpur Legal Aid Centre on 7 May 2009 ('the SUHAKAM Report'). The applicant argues that Zaleha Yusof's decision is significant and pertinent because it would reflect adversely and negatively on the credibility of SP25 who was an important witness in the second sodomy trial. Accordingly, learned counsel argued that had Zaleha Yusof's decision been available at the trial, the learned judge would have in all probabilities ruled that the evidence of SP25 was unreliable, unworthy of belief and ought to have been rejected. In all likelihood, the learned judge would have ruled that the prosecution had failed to make out a prima facie case. D E F

[5] The respondent vehemently opposes encl 62a, contending that the motion fails to meet the cumulative requirements expounded in the case of *R v Parks* [1961] 3 All ER 633 for leave to be granted under s 61 of the Courts of Judicature Act 1964 ('CJA'). Furthermore, it was contended that encl 62a does not seek to adduce additional evidence which was not available during the trial, but instead it seeks to reopen facts or issues already litigated at the second sodomy trial. According to the respondent, this is not within the contemplation of s 61 of the CJA. G H

[6] The respondent expresses concerns that the notice of motion would result in further delay in disposing the appeal.

Scope of s 61 of the CJA I

[7] The law pertaining to adducing additional evidence in an appeal is not controversial, and is guided by s 61 of the CJA which states in the following terms:

61 Additional evidence

(1) In dealing with any appeal in a criminal case the Court of Appeal may, if it thinks additional evidence to be necessary, either take such evidence itself or direct it to be taken by the trial court.

(2) When the additional evidence is taken by the trial court, it shall certify the evidence, with a statement of its opinion on the case considered with regard to the additional evidence, to the Court of Appeal, and the Court of Appeal shall thereupon proceed to dispose of the appeal.

(3) The parties to the appeal shall be present when additional evidence is taken.

(4) In dealing with any appeal in a criminal case the Court of Appeal may also, if it thinks fit, call for and receive from the trial court a report of any matter connected with the trial.

[8] A plain reading of s 61(1) of the CJA reveals that wide powers have been invested with the Court of Appeal to receive additional evidence. All that is required to be satisfied is that the additional evidence is necessary. (see *Phung Geok Hoay lwn Pendakwa Raya* [2013] 3 MLJ 728). However, it is pertinent to note this section should be invoked as an exception more than a rule. This is because an appeal must be decided on the evidence which was before the trial court. An exceptional power such as this, must be exercised judiciously and not capriciously or arbitrarily having regards to the justice of the case. Any improper or capricious exercise of such power may lead to undesirable result.

[9] The underlying reason why additional or fresh evidence is generally not allowed on appeal is simple. A litigation must come to an end as a matter of public policy — *interest reipublicae ut sit finis litium* (it is in the interest of the society as a whole that there be an end to litigation). In *Leng Lian v SM Yusudian* [1939] MLJ Rep 222 Aitken J remarked that *the Courts are very unwilling to allow (a completed case) to be reopened for the purpose of hearing new evidence except for good and substantial cause.*

[10] There is a long list of authority in major common law jurisdictions in support of this public policy. Lord Wilberforce in *Ampthill Peerage Case* [1976] 2 All ER 411 (HL) 417h–418c said that limits must be placed on citizens to open and reopen disputes. The same point was made by the Court of Appeal in *Taylor and another v Lawrence and another* [2002] 2 All ER 353 (CA) and further reaffirmed by the Court of Appeal in *Re Uddin (a child) (serious injury: standard of proof)* [2005] 3 All ER 550 (CA). Similar voice was echoed in the Canadian case of *Brown v The Queen* (1993) 16 CRR (2nd) 290 (SC) 293–294, in her dissenting judgment, L'Heureux-Dube J explained the general principle of finality as follows, in relation to the raising of new arguments on appeal:

> … the general prohibition against new arguments on appeal supports the overarching societal interest in the finality of litigation in criminal matters. Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution of criminal matters could be spread out over years in the most routine cases. Moreover, society's expectation that criminal matters will be disposed of fairly and fully at the first instance and its respect for the administration of justice would be undermined. Juries would rightfully be uncertain if they were fulfilling an important societal function or merely wasting their time. For these reasons, courts have always adhered closely to the rule that such tactics will not be permitted.

[11] In *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, the High Court of Australia explained the general principle of finality of which the prohibition on adducing additional evidence on appeal forms a part:

> A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud. The tenet also finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding.
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> The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law. Restraints on the nature and availability of appeals, rules about what points may be taken on appeal and rules about when further evidence may be called in an appeal (in particular, the so-called 'fresh evidence rule') are all rules based on the need for finality.

[12] In sum, we can safely conclude that public policy demands that the principle of finality in litigation should be preserved. The appellate court should not travel outside the record of the lower court and not take evidence in appeal. Consequently, additional or fresh evidence may only be admitted in exceptional circumstances where such evidence is essential to the just decision of the case.

Conditions to justify reception of additional evidence

[13] The principles on which a Court of Appeal is allowed to receive

additional evidence were enunciated in the case of *R v Parks* [1961] 3 All ER 633 which was later approved by the House of Lords in the case of *R v Pendleton* [2002] 1 WLR 72. These principles were also applied in the Malaysian case of *Murugayah v Public Prosecutor* [2004] 2 MLJ 545; [2004] 1 LNS 109. In the case of *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289; [1975] LNS 7 Syed Agil Barakbah (as he then was) had this to say on the four requirements adumbrated in *R v Parks*:

> In considering such application the appellate court has always adopted the attitude that it is only in the most exceptional circumstances, and subject to what may be described as exceptional conditions, that the Court is ever willing to listen to additional evidence. (*Mohamed bin Jamal v PP* [1964] MLJ 254 255, per Thomson LP, quoting Hallet J in the case of *R v Jordan* (1956) 40 Cr App R 152 154). It is clear, therefore that not only the circumstances must be most exceptional but the subject which is proposed to be adduced by further evidence is subject to exceptional conditions. It becomes necessary only if a failure of justice would result if such additional evidence was not taken and allowed when additional facts have come to light since the date of trial. The matter is left entirely to the discretion of the Court. The matter is left entirely to the discretion of the Court. The principles which the Courts have decided in the course of years may be summarised according to the passage from the judgment or Lord Parker CJ in the case of *R v Parks* [1961] 2 All ER 633 634:
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> (a) the evidence sought to be called must be evidence which was not available at the trial;
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> (b) the evidence must be relevant to the issues;
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> (c) it must be credible evidence in the sense of being well capable of belief; and
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> (d) the Court will, after considering the evidence, go on to consider whether there might have been reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

[14] Reverting to the motion before us, for the reasons that follow we agree with the submissions of learned deputy public prosecutor that there is no merit in the grounds supporting the motion in encl 62a.

Failure to comply with the cumulative conditions: report already available

[15] First, we find encl 62a fails to meet the four cumulative requirements enunciated in *R v Parks* for this court to exercise our discretion under s 61 of the CJA. This is because it is plain and clear that the SUHAKAM report is evidence already available to the applicant at the second sodomy trial. Zaleha Yusof's decision is based entirely on the SUHAKAM Report which finds that *DSP Jude Pereira either consciously were not telling the truth or suffered from a serious bout of loss of memory*. The SUHAKAM report was the determinative factor in Zaleha

Yusof's decision. It is not in dispute that the SUHAKAM report was already available on 23 April 2010. That aside, it was also referred and marked as IDD in the second sodomy trial.

Decision on petition is irrelevant

[16] We find Zaleha Yusof's decision is irrelevant to this motion for two reasons. Firstly, it is irrelevant by virtue of s 43 of the Evidence Act 1950. It is pertinent to note that Zaleha Yusof's decision is inadmissible for the purpose of proving the truth in the hearing of the applicant's appeal. A judgment is conclusive only in respect of the legal state of affairs affected but not the facts upon which it is based. The object of s 43 is explained by *Sarkar on Evidence* (15th Ed), Vol 1 at p 839 para 2 as follows:

> The object of enacting Section 43 is of two fold: (1) to treat every case a class by itself so that the judgment delivered in one case may not be availed of by parties in another case; and (2) to maintain the independence of courts by preventing the parties from submitting before the court hearing their case the judgments of other courts.

Again at p 932 he said:

> The judgment merely establishes the fact that there has been a judgment but does not prove its correctness.

[17] Secondly, SP25's credibility has been vigorously challenged during the second sodomy trial based on the SUHAKAM report. In the cross examination of SP25 in the second sodomy trial, SP25 in fact did not dispute the finding of the SUHAKAM report as clearly shown in at pp 1886–1888 of the appeal record produced below:

> *Encik Karpal Singh:*
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> I'm coming to it, its credibility.
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> S: Here is the copy of the findings of the Enquiry. I want you to read it. Have a look at page 34. Boleh baca apa isi kandungan dari baris yang pertama dalam muka surat itu?
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> J: We find the evidence of DSP Jude Pereira totally unsatisfactory. DSP Jude Pereira either consciously or not, was not telling the truth or suffered from a serious bout of loss memory. DSP Jude Pereira initially denied interacting with any lawyers until he was confronted with direct evidence and documentary evidence in the form of the video footage. He believed OCPD Wan Bahari did not have any conversation with the five lawyers. Looking at the evidence as a whole, it seems to be very dependent on DSP Jude Pereira for the purpose of interaction with the five lawyers and legal advice on matters of criminal proceedings.
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> S: Disebut di sana DSP Jude Pereira either consciously was not telling the truth or suffered from a serious bout of loss of memory. DSP Jude Pereira initially denied interacting with any lawyers until he was confronted with direct evidence and

documentary evidence in the form of video footage. Ada keputusan dibuat oleh Enquiry itu bahawa Jude Pereira tidak memberi keterangan yang boleh diterima?

J: Ini adalah pendapat daripada pihak SUHAKAM.

S: Pendapat daripada siapa?

J: SUHAKAM.

Mahkamah:

He already agreed that's the decision of SUHAKAM.

Encik Karpal Singh:

I'm just coming to the end of this part.

S: SUHAKAM is a body set up Parliament? You are aware with that, isn't it?

J: Ya, saya faham.

Encik Karpal Singh:

We want this report to be marked as an exhibit. We put in the whole report

Dato' Yusof:

At this junction, can this be marked as ID.

Encik Karpal Singh:

It is a certified copy.

Mahkamah:

He's not the maker. What is important to you is the findings. The findings he already read orally. It's already there. He is not the maker, how to put in as exhibit.

Encik Karpal Singh:

It can be. It's a certified copy of the report. If Yang Arif is satisfied with what he had said, I'll …

Mahkamah:

Oral evidence is much better.

Dato' Yusof:

He had made confession.

Mahkamah:

He read that findings.

[18] En Ram Karpal Singh, learned counsel for the applicant contended that SP25 tampered with the DNA sample exhibit in the second sodomy trial. All the samples that were collected from the complainant ('PW1') in the second sodomy trial were put in a plastic bag ('P27') and then handed over the SP25 to be handed over to the chemist ('PW5') who did DNA testing of the sample. It was not disputed that SP25 had cut open the heat-sealed (P27) containing the containers with swabs. Since the challenge made was relating to tampering of evidence, it was contended that the credibility of SP25 is of paramount importance. Therefore, learned counsel submitted the evidence intended to be adduced through the recall of SP25 is relevant. This argument, with respect, is devoid of any merit. We note from the appeal records that the credibility of SP25 has been vigorously challenged and the central plank of the challenge was based on the said SUHAKAM report.

[19] We were further inform during the submission by learned counsel for the appellant that Zaleha Yusof's decision is also pending disposal at the Court of Appeal.

[20] Since we find that the applicant has failed to satisfy two of the four cumulative conditions for this court to invoke s 61 of the Act, we find no necessity to deal with other requirements.

Prima facie case

[21] Moreover, in deciding whether the prosecution has succeeded in establishing a prima facie case in the second sodomy trial, we note that the learned judge did not rely solely on the evidence of SP25 but also on the evidence of the complainant ('PW1'), the chemists ('PW5') and ('PVV6') and the medical officer ('SP4').

[22] We also find encl 62a is barren of specific reference to what finding of fact made by the learned trial judge in the second sodomy trial intended to be controverted by the evidence sought to be adduced in this motion. The motion also fails to clearly identify with precision the intended evidence which is desired to be obtained in recalling SP25.

[23] We are of the view that s 61 of the Act does not permit a party to simply request a particular witness be recalled to further testify at the appellate stage without the party providing to court the precise nature of the intended or proffered evidence sought to be admitted.

CONCLUSION

[24] The authorities show quite clearly that while under s 61 of the Act, the

court is given a general discretion to admit evidence of matters that have occurred since the date of the judgment, that discretion must be exercised sparingly having regard to the important principle that there should be finality in judgment. In *Mulholland and another v Mitchell (by his next friend Hazel Doreen Mitchell)* [1971] 1 All ER 307 Lord Wilberforce had this to say:

> This abbreviated and over-simplified description shows at least what limitations must inherently exist to the Court of Appeal's discretion to admit further evidence. It makes it clear that an impossible situation would arise if evidence were to be admitted of every change which may have taken place since the trial. In the nature of things medical condition will vary from year to year, or month to month; earning prospects may change, prices may rise, or even fall. If the Court of Appeal were to admit evidence of changes of this kind (and it must not be overlooked that a facility given to one side cannot be denied to the other), not only would a mass of appeals involve the hearing of evidence but the Court of Appeal would merely be faced with the same uncertainties as faced the judge, and of which the judge has *ex hypothesi*, already taken account. In other words an appellant's contention that factors such as these have changed since the trial must, in normal cases, be met with the answer that the judge, in his estimate has already taken account of them.

[25] In this instant case, we have given our anxious consideration whether the notice of motion should be granted. In our considered view, the motion to recall SP25 falters at the threshold and must therefore be refused.

Application dismissed.

Reported by Kohila Nesan